Supreme Court of the United States

October Term, 1943

No. 51

LONNIE E. SMITH,

Petitioner,

against

S. E. ALLWRIGHT, Election Judge and JAMES E. LUIZZA, Associate Election Judge, 48th Precinct of Harris County, Texas,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* AND BRIEF OF THE WORKERS DEFENSE LEAGUE, *AMICUS CURIAE*

JOHN F. FINERTY,
Washington, D. C.,
Attorney for the Workers Defense League, *Amicus Curiae.*

ERNEST FLEISCHMAN,
New York, N. Y.,
of Counsel.

Motion for Leave to File Brief as *Amicus Curiae*

To the Honorable the Supreme Court of the United States:

The undersigned, as counsel for the Workers Defense League, respectfully moves this Honorable Court for leave to file the accompanying brief as *Amicus Curiae*. The consent of the attorneys for the petitioner to the filing of this brief has been obtained. The attorney for the respondents has failed to reply to repeated requests for such consent.

Special reasons in support of this motion are set out in the accompanying brief.

John F. Finerty,
Washington, D. C.,
Attorney for the Workers Defense League, *Amicus Curiae*.

November 8, 1943.

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BRIEF OF THE WORKERS DEFENSE LEAGUE, *AMICUS CURIAE*

The Workers Defense League is submitting a brief herein as *amicus curiae* because of its interest in the issue of race discrimination raised in this case.

The Workers Defense League is an organization dedicated to the protection and extension of those civil rights which are guaranteed by the laws and Constitutions of the United States and the several states.

It maintains that the right to vote and moreover, the right to participate in the election of candidates for public office, is the keystone of our democratic form of government. To deny that right to vote and the right to participate in primary elections to qualified Negro electors, when such primary elections are "*an integral part of the*

election machinery in the state which is determinative of Federal officers'"[1] is to disfranchise a vast number of our citizenry. These disfranchised, who today give of their labor, fortunes and lives to our nation, must have the right to participate in their government if our democracy is to be a reality and more than a hollow shell.

The right to vote signifies more than the right to cast one's ballot at the general election. It signifies the right of qualified electors, to make and participate in the choice of the candidate at the primary election irrespective of whether or not the primary election candidate sometimes, always or never is the successful candidate at the final election. In this case, the petitioner, a native born citizen of the United States and a qualified elector, residing in Houston, Texas, was refused the right to vote at the primary on the Democratic ticket for the offices of United States Senator and Representatives of Congress.

Petitioner sought damages for himself and a declaratory judgment on the ground that such denial of the right to vote was a violation of Sections 31 and 43 of Title 8 of the United States Code, in that the respondents had subjected him to a deprivation of rights as provided for by Sections 2 and 4 of Article 1, and by the 14th, 15th and 17th Amendments of the United States Constitution. The Circuit Court of Appeals, affirming judgment for the respondents,[2] based its decision on the authority of *Grovey* v. *Townsend*[3] and recognizing the implications of the decision rendered in *United States* v. *Classic*[4] attempted to distinguish between that case and the case at bar. The court enumerated three distinctions. They were:

(1) The *Classic* case was a criminal case, whereas this case arose out of a civil suit.

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[1] This quotation is from the question presented by the petitioner for certiorari heretofore granted in this case.

[2] *Smith* v. *Allwright*, C. C. A. Texas, 131 Fed. (2) 593.

[3] 295 U. S. 45.

[4] 313 U. S. 299.

(2) The *Classic* case involved Louisiana statutes whereas this case involves the Statutes of Texas.

(3) In the *Classic* case, there was no opinion of the Court directly overruling the decision rendered in *Grovey* v. *Townsend.*

We shall take up these points seriatim. Although the *Classic* case did concern itself with a criminal action under Sections 19 and 20 of the Criminal Code (18 U. S. Code annotated, Sections 51 and 52), the rationale of the *Classic* case covers a civil action because Section 43, Title 8 of the United States Code Annotated is part of the same original act as Sections 19 and 20 of the Criminal Code. Therefore, the civil action based on a civil statute is merely another aspect of the criminal action based on the criminal statutes heretofore upheld in the *Classic* case.

The Circuit Court said that the *Classic* case also involved the statutes of the State of Louisiana and not the statutes of Texas. The court is correct in this statement, but although there is a distinction, there is no real difference, because the record will indicate that the statutes covering primary elections in both states are almost identical and in both states we note four important parallels. They are as follows:

(a) Both states bear part of the expense of the primary elections.

(b) The election of candidates by means of a primary election is required as to the Democratic party in both states.

(c) A defeated candidate in the primaries cannot have his name on the ballot in the regular election.

(d) The successful Democratic candidate, as a matter of fact, is assured of election.

The third and last point made by the Circuit Court is that the *Classic* case did not directly overrule the decision of the *Grovey* case. It must be noted that the *Classic* case was decided later in time than the *Grovey* case and we contend that the language in the *Classic* case does cover the issues involved in the case at bar.

The Court at page 316 of the *Classic* case stated:

> "That the free choice by the people of representatives in Congress, subject only to the restrictions to be found in Sections 2 and 4 of Article 1 and elsewhere in the Constitution, was one of the great purposes of our constitutional scheme of government, cannot be doubted".

The Court went on to say that it is immaterial whether the State chooses to hold the election in one or two steps when the primary is an integral part of the electoral process.

On page 318, the Court said:

> "The right to participate in the choice of representatives for Congress includes, as we have said, the right to cast a ballot and to have it counted at the general election, whether for the successful candidate or not. Where the state law has made the primary an integral part of the procedure of choice or where in fact the primary effectively controls the choice, the right of the elector to have his ballot counted at the primary, is likewise included in the right protected by Article 1, Section 2."

The Court also stated that it is not necessary that the primary choice be the invariable choice in the general election. Therefore, the implications of the *Classic* case covers situations which are not even as favorable as the one in the case at bar, because in Texas, as it was stipulated in the case herein, the Democratic Party primary choice is invariably the successful candidate of the general election.

The Court at page 318 of the *Classic* case stated:

> "And this right of participation is protected just as the right to vote at the election, where the primary is by law made an integral part of the election machinery, whether the voter exercises his right in a party primary *which invariably, sometimes, or never determines the ultimate choice of the representatives.*" (Italics ours.)

On page 323 of the same decision, the Court indicated that there would have been further grounds for their decision if the persons aggrieved were Negroes since their rights would have been clearly protected by the Fourteenth Amendment of the Constitution of the United States.

In conclusion, it is our contention that the acts of the respondents complained of, were in direct violation of the petitioner's rights secured to him by Sections 2 and 4 of Article 1 and the Fourteenth, Fifteenth and Seventeenth Amendments of the United States Constitution.

Conclusion

WHEREFORE, it is respectfully submitted that the judgment of the United States Circuit Court of Appeals for the Fifth Circuit should be reversed.

Respectfully submitted,

JOHN F. FINERTY,
Washington, D. C.,
Attorney for the Workers Defense League, *Amicus Curiae.*

ERNEST FLEISCHMAN,
New York, N. Y.,
of Counsel.